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IN THE

Supreme Court of the United States

October Term, 1932

No. 290

CHASE NATIONAL BANK OF THE CITY OF NEW YORK, SUCCESSOR TRUSTEE TO THE EQUITABLE TRUST COMPANY OF NEW YORK, N. Y.,

Petitioner,

vs.

THE CITY OF NORWALK, OHIO,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

G. RAY CRAIG, *Norwalk, Ohio,*
REX F. BRACY, *Norwalk, Ohio,*
E. G. MARTIN, *Norwalk, Ohio,*
WILLIAMS, EVERSMAN & MORGAN,
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INDEX

	Page
Statement of the Case	1
Question Presented	7
Argument	8
1. The Decree of the District Court Violates the Provisions of Section 265 of the Judicial Code	8
(a) The Relief Granted by the District Court Does Not Fall Within the Exceptions to the Prohibition Against Interference With State Court Action by Federal Courts	8
(b) The Decree of the District Court Is a Direct Interference With the Proceedings of the State Court	11
(c) By Reason of the Nature of an Action in Quo Warranto in Ohio the City Was Not and Could Not Be a Party to the Proceedings in Quo Warranto	15
2. The Petitioner's Claim of Perpetual Franchise Is Without Substance	17
(a) The Franchise Ordinance of October 7, 1890, Limited as It Was to a Twenty-Year Term, Constituted a Binding Agreement Upon Norwalk Incandescent Light Company and Its Successors, Including the Petitioner, Under the Decisions of This Court	17
(b) Under the Statutes of Ohio and the Decisions of Supreme Court of Ohio Construing the Same, Predecessors of Petitioner's Mortgagor Did Not Secure a Perpetual Easement to Use the Streets of Respondent City by Incorporation	19
3. Enforcement of a Valid State Court Judgment Cannot Be Enjoined by a Person Not a Party to Such State Proceedings Upon the Ground That Such Person Has Been Deprived of Property Without Due Process of Law	23
Conclusion	25
Appendix "A"—Opinion of Court of Appeals	27
Appendix "B"—Opinion of Supreme Court	39

AUTHORITIES CITED

Cases	Page
Association vs. Hurst, (1893) 59 Fed. 1	10, 24
Atchison Ry. Co. vs. Wells, (1924) 265 U. S. 101	10
Ballard & Ballard Co. vs. Munson Steamship Line, (1928) 25 F. (2d) 252	10
Bankers Trust Co. vs. City of Raton, (1922) 258 U. S. 328 at p. 335	18
Blair vs. Chicago, (1906) 201 U. S. 400, 463	22
Bristow Battery Co. vs. Board of Commissioners, (1930) 37 F. (2d) 504	23, 24
Evans vs. Gorman, (1902) 115 F. 399	13
Farmer vs. Columbiana Telephone Co., (1905) 72 O. S. 526	20, 21
Firestone Tire & Rubber Co. vs. Marlboro Cotton Mills, (1922) 282 F. 811, certiorari denied 260 U. S. 749	10
Gelpcke vs. Dubuque, (1864) 1 Wallace 175, 68 U. S. 175	22, 23
Great Northern Ry. Co. vs. Sunburst Oil & Refining Co., (1932) 287 U. S. 358, 77 L. Ed. 153	22
Harrison et al. vs. Triplex Gold Mines, Ltd., et al., (1929) 33 F. (2d) 667, 672	13
Hardin-Wyandot Lighting Co. vs. Upper Sandusky, (1916) 93 O. S. 428	20, 21
Hardin-Wyandot Lighting Co. vs. Upper Sandusky, (1916) 251 U. S. 173	19, 20
Hill vs. Elizabeth City, (1923) 291 Fed. 194, 210	23
Lehman vs. Spurway, (1932) 58 F. (2d) 227	10
Louisville Trust Co. vs. City of Cincinnati, (1896) 76 F. 296	14, 15, 22
Mills vs. Providence Life & Trust Co., (1900) 100 F. 344	10
Northern Ohio Trac. Co. vs. State of Ohio, (1918) 245 U. S. 574	19

Page

Ohio Elec. Power Co. vs. State of Ohio ex rel., (1929) 121 O. S. 235 ..... 6, 19
Ohio Public Service Co. vs. State of Ohio ex rel. Fritz, (1927) 274 U. S. 12 19
Old Colony Trust Co. vs. Omaha, (1913) 230 U. S. 100. 10
People vs. Mortenson, (1922) 224 Ill. App. 221 12
Phelps vs. Mutual Reserve Asso., (1901) 112 F. 453, 463. 10
Queen City Telephone Co. vs. Cincinnati, (1905) 73 O. S. 64 ..... 20, 21
Russell vs. Detrick, (1927) 23 F. (2d) 175 ..... 13, 14
Sears vs. City of Akron, (1918) 246 U. S. 242 20
Simon vs. Southern Ry. Co., (1915) 236 U. S. 115. ..... 10, 12, 14
State vs. Cahill, (1906) 131 Iowa 236, 108 N. W. 453. 12
State ex rel. Martin vs. Ohio Elec. Power Co., (1928) 35 O. App. 481 ..... 6, 11, 19, 21
State ex rel. vs. Mutual Benefit Asso., (1885) 42 O. S. 579 17
Wells Fargo & Co. vs. Taylor, (1920) 254 U. S. 175 ..... 8, 9, 13, 14
Western Union Telegraph Co. vs. L. & N. R. Co., (1914) 218 F. 628 13
Western Union Telegraph Co. vs. Tompa, (1931) 51 F. (2d) 1032 9
Zanesville vs. Zanesville Telephone & Telegraph Co., (1901) 64 O. S. 67 ..... 20, 21

TEXTS AND STATUTES

Judicial Code, Section 265 8
Ohio General Code, Section 12317 12
Ordinance of July 30, 1890, Sec. 1 2
United States Code Annotated, Title 28, Sec. 379 ... 8

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

STATEMENT OF THE CASE

The City of Norwalk became a municipal corporation under the laws of the State of Ohio in 1859, and became a city under the laws of Ohio about April 4, 1881

(R. 38). Its population between 1890 and the present, the period involved in this litigation, has varied between 7,000 and 8,000, with no substantial change in territorial extent. (Plaintiff's Exhibit 1, R. 277.) Early in 1890, six men organized a partnership styled "The Norwalk Incandescent Light Company" for the purpose of generating and furnishing electricity in the City of Norwalk (R. 51). On July 30, 1890, upon application of The Norwalk Incandescent Light Company, the council of the City of Norwalk passed an ordinance entitled "An Ordinance to Grant Certain Privileges as Therein Set Forth to The Incandescent Light Company of Norwalk, Ohio." The first sentence of Section 1 of the ordinance is as follows:

> "Sec. 1. Be it ordained by the city council of Norwalk, Ohio, that The Norwalk Incandescent Light Company of Norwalk, Ohio, its successors and assigns are hereby granted *for the term of twenty years from the passage of this ordinance,* the right of way through, in and upon the streets, sidewalks, alleys and public grounds of the said city for the use and purpose of therein and thereon erecting, maintaining and using all necessary poles or posts of wood, iron or other suitable material, and the necessary wires successfully to operate and use the Heisler system of incandescent lighting in said city. * * *" (Italics ours.)
>
> (Exhibit A attached to the Second Amendment and Supplement to the Bill of Complaint, R. 35.)

On October 7, 1890, upon application of the aforesaid partnership, the council of the City of Norwalk passed an ordinance readopting the ordinance of July 30, 1890, with the exception that the limitation to the

Heisler system of incandescent lighting was omitted. That ordinance was accepted by the partnership (R. 36, 62, 63).

Shortly after the passage of the ordinance of July 30, 1890, the partnership constructed a generating plant and a distributing system throughout the city consisting of lines, poles, wires, and the usual attachments therefor and supplied the inhabitants of the city with electricity for domestic and commercial use (R. 53). A single system of pole lines carried two sets of wires, one for direct current for supplying electricity for street lighting, and the other for alternating current, supplying electricity for domestic and commercial use (R. 57). This system of pole lines, with a few additions and replacements is now operated by Ohio Electric Power Company, petitioner's mortgagor (R. 64).

In March, 1891, the partnership was succeeded in the operation of its electrical distribution system by a corporation styled "The Incandescent Light & Power Company," organized under the laws of Ohio, by members of the partnership and others; and thereupon the partnership transferred all of its property, including the franchise of October 7, 1890, by a written bill of sale to The Incandescent Light & Power Company, which continued the operation of the generating plant and electrical distribution system in the same manner as it had been conducted by the partnership (R. 54-62).

On May 17, 1895, The Northern Electric Company was organized under the laws of the State of Ohio

> "for the purpose of manufacturing and producing electricity for light, heat and power." (R. 289.)

On May 20, 1895, The Northern Electric Company purchased the generating plant and distribution system constructed by the partnership from individuals, who had previously purchased the same from assignees for the benefit of creditors of The Incandescent Light & Power Company, and proceeded to operate said plant and distribution system as it had previously been operated by its predecessors in title (R. 291). By mesne conveyances, these properties, franchises and rights were ultimately sold, transferred and assigned to petitioner's mortgagor, Ohio Electric Power Company, on May 22, 1925. Prior to the date of such conveyance, Ohio Electric Power Company had executed a mortgage and deed of trust to petitioner's predecessor in title as trustee, conveying to the trustee all of the real estate, franchises and personal property which Ohio Electric Power Company then owned, to secure mortgage bonds which might be issued under such mortgage (R. 379).

On May 25, 1925, Ohio Electric Power Company executed a supplemental mortgage to said predecessor trustee conveying, among other properties, the generating equipment and electrical distribution system in the City of Norwalk, and

> "also all such other contracts, franchises, rights, privileges and agreements of the grantor in the City of Norwalk, Ohio,"

to secure such first mortgage bonds as might be issued under the original mortgage (R. 412).

On March 23, 1926, the council of the City of Norwalk passed a resolution requesting Ohio Electric Power Company within 30 days thereafter to remove from the streets, alleys and other public places of the city its electrical equipment erected thereon (R. 444-446).

Ohio Electric Power Company having failed to remove its equipment, the city council, on May 18, 1926, passed a resolution ordering that complaint be filed with Edgar G. Martin, prosecuting attorney of Huron County, Ohio, requesting such officer to take such legal steps as might be provided by the laws of the State of Ohio in *quo warranto* to oust Ohio Electric Power Company from the streets, alleys and other public places of the city (R. 448, 449).

On May 19, 1926, Edgar G. Martin, as prosecuting attorney of Huron County, Ohio, filed, in the Court of Appeals of said county, a petition in *quo warranto* against Ohio Electric Power Company praying that Ohio Electric Power Company be required to answer by what warrant it occupied the streets, alleys and public places of the city, and that it be ousted from using the same.

Issue to said petition was made by the filing of an answer thereto by Ohio Electric Power Company and later by an amended answer claiming that it had erected and maintained poles, wires and other electrical equipment in the streets, alleys and other places in the City of Norwalk for the purpose of doing a commercial and private lighting business therein, and that, by virtue of franchises granted to it by the State of Ohio and the City of Norwalk, it had a perpetual right so to occupy said streets, alleys and other places.

On June 7, 1928, such action in *quo warranto* was submitted to the Court of Appeals on the pleadings and the evidence. The Court of Appeals found in favor of the State of Ohio and decreed and ordered that Ohio Electric Power Company be ousted from continuing the use and occupation of the public streets, lanes, alleys,

avenues and other public places of the City of Norwalk for the erection and maintenance of poles, wires, guy wires and electrical equipment for the purpose of supplying private individuals, firms and corporations of said city with electricity for commercial and private lighting purposes, and from using and exercising any and all said franchises, rights and privileges within the city limits of the said City of Norwalk, Ohio.

State of Ohio ex rel. Martin vs. Ohio Electric Power Company, 35 O. App. 481.

The opinion is appended hereto as "Appendix A."

The case was taken on error to the Supreme Court of Ohio by Ohio Electric Power Company. That court reviewed the proceedings and judgment of the Court of Appeals of Huron County, Ohio, and on June 12, 1929, affirmed said judgment and issued a mandate to the Court of Appeals to carry said judgment and order into execution.

Ohio Electric Power Company vs. State of Ohio ex rel. Martin, 121 O. S. 235.

The opinion is appended hereto as "Appendix B."

The bill of complaint in the present litigation was filed January 3, 1930 (R. 2).

After the hearing of the case, the District Court entered an order enjoining and restraining the city, its attorneys, officers, agents, employees and representatives

> "and all persons whomsoever to whom notice of this order shall come,"

from in any manner interfering with or interrupting the full exercise of any and all of the franchise rights of Ohio Electric Power Company, as found by the court,

"and from taking any steps, or doing any act to dismantle, wreck or remove any part of said existing system from the streets, alleys and public places of said city, and from taking any steps or action of any kind whatever to cause the enforcement or carrying out by the sheriff of Huron County, Ohio, or any of his deputies, or by any other officers of any of the courts in the State of Ohio of the judgment of ouster entered by the Court of Appeals of Huron County, Ohio, in the *quo warranto* action instituted therein in the name of the State of Ohio on the relation of Edgar G. Martin, prosecuting attorney of Huron County, State of Ohio, decided May 21, 1928, which judgment was affirmed by the Supreme Court of Ohio on June 12, 1929, and from applying to any of the courts of the State of Ohio for any writ, process or order of any kind whatever for the purpose of enforcing and carrying out said judgment of ouster." (R. 241-242.)

The Circuit Court of Appeals, after hearing, ordered that as the alleged error in the state court decree was the sole ground for the relief sought and as the record showed no circumstances justifying equitable interference with said decree, the injunction issued should be set aside and the cause remanded with directions to dismiss the bill.

QUESTION PRESENTED

Has a Federal Court, in View of the Provisions of Section 265 of the Judicial Code, the Power to Enjoin a State Court From Enforcing a Valid Decree of Ouster Entered in Quo Warranto Proceedings Against a Corporation Upon Application of Such Corporation's Mortgagee?

ARGUMENT

1. THE DECREE OF THE DISTRICT COURT VIOLATES THE PROVISIONS OF SECTION 265 OF THE JUDICIAL CODE.

(a) The Relief Granted by the District Court Does Not Fall Within the Exceptions to the Prohibition Against Interference With State Court Action by Federal Courts.

Section 265 of the Judicial Code provides:

> "The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a state except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy." (Title 28, U. S. C. A., §379.)

This provision of the Judicial Code does not prevent the federal courts from enjoining state court proceedings which have the effect (1) of enforcing local statutes which are repugnant to the Constitution of the United States, or (2) of defeating or impairing the jurisdiction of the federal courts, or (3) of depriving a party from relief of a judgment under circumstances where its enforcement would be contrary to recognized principles of equity and standards of good conscience.

Wells Fargo & Co. vs. Taylor, 254 U. S. 175.

The present case does not fall within any of these three exceptions to the broad prohibition of the statute.

As the Circuit Court of Appeals pointed out, there has been no claim made that the judgment of the state

court is void or that it was based upon fraud or mistake of fact.

It is not claimed that Ohio Electric Power Company did not have a fair trial in the state courts or that it did not have ample opportunity of fully presenting its case or that there was any suppression of evidence or that there was any inequitable or unconscionable conduct on the part of the plaintiff in the state court proceedings. The sole claim of the petitioner is that it has presented its claim that the twenty-year limitation was not a binding covenant upon a different theory than the same claim was presented by Ohio Electric Power Company in the *quo warranto* proceedings in the state courts. (See page 26 of petitioner's brief.)

In all of the cases cited by petitioner wherein a federal court enjoined the prevailing party in a state court from enforcing a judgment obtained in the state court, the judgment was void or voidable on some well recognized equitable ground. In the case at bar, the most that can be claimed is that the mortgagor's trustee has not been heard upon the merits of its mortgagor's claim that it (the mortgagor) has a perpetual franchise to occupy the streets, alleys and public places of the City of Norwalk.

In *Wells Fargo Co. vs. Taylor, supra*, the plaintiff in the state court obtained a judgment against the railroad company which not only violated the plaintiff's agreement of employment with the express company, but perpetuated a fraud upon the express company. The judgment was, therefore, one which in equity and good conscience the plaintiff had no right to enforce. *Western Union Telegraph Co. vs. Tompa*, 51 F. (2d) 1032, is to

the same effect. No element of fraud exists in the case at bar.

In *Simon vs. Southern Ry. Co.*, 236 U. S. 115, it was held that the judgment obtained in the state court was void and being void the plaintiff acquired no rights thereby and could be enjoined by a federal court from attempting to enforce what was a judgment in name but a nullity in fact.

Atchison Ry. Co. vs. Wells, 265 U. S. 101; *The Firestone Tire & Rubber Co. vs. Marlboro Cotton Mills*, 282 F. 811, *certiorari* denied 260 U. S. 749, and *Ballard & Ballard Co. vs. Munson Steamship Line*, 25 F. (2d) 252, are to the same effect. The judgment of ouster involved in this case is valid and binding in all respects.

The order of ouster entered by the state court not being void, voidable or issued under a mistake of fact, it is clear that the possibility that the enforcement of such order may affect the rights of persons not parties to the *quo warranto* case does not justify interference with the proceedings of the state court.

Phelps vs. Mutual Reserve Asso., 112 F. 453, 463;
Association vs. Hurst, 59 F. 1;
Mills vs. Providence Life & Trust Co., 100 F. 344;
Lehman vs. Spurway, 58 F. (2d) 227.

In *Old Colony Trust Co. vs. Omaha*, 230 U. S. 100, the question of interference with judicial proceedings was in no way involved. There the electric light company brought an action against the City of Omaha in the federal court to enjoin the enforcement of a munici-

pal ordinance. The bill of complaint was dismissed; the judgment of the lower court affirmed by the Circuit Court of Appeals; and the cause was then pending upon appeal in this court when the trustee under the electric light company's mortgage brought a new action in the same federal court to enjoin the enforcement of the same ordinance. The question ruled upon by the Supreme Court was whether the earlier decree was *res adjudicata* in the second case. It was not sought in the second case to interfere with the proceedings in the earlier case. This court had no occasion to consider the question of interference with judicial proceedings. Section 265 of the Judicial Code was in no way involved.

Without urging that the decision in the *quo warranto* case in the state courts is an adjudication against the petitioner of the issues in this case, respondent does, however, urge that the facts in this case do not entitle the petitioner to the relief prayed for.

(b) The Decree of the District Court Is a Direct Interference With the Proceedings of the State Court.

Petitioner ignores the distinction between the interference with the enforcement of money judgments and interference with the enforcement of a valid order of ouster issued in a *quo warranto* action.

In *State ex rel. Martin vs. Ohio Electric Power Co., supra,* the Court of Appeals of Huron County, Ohio, issued an order of ouster against the defendant. This order was issued under Section 12317 of the General Code of Ohio, which reads as follows:

"Sec. 12317. JUDGMENT WHERE OFFICE, FRANCHISE, ETC., FOUND TO HAVE BEEN USURPED. When a defendant is found guilty of usurping, intruding into or unlawfully holding or exercising an office, franchise or privilege, judgment shall be rendered that he be ousted and altogether excluded therefrom, and that the relator recover his costs."

It is an order by the court to the defendant and its violation is punishable by contempt proceedings.

See:

State vs. Cahill, 131 Iowa 236, 108 N. W. 453;

People vs. Mortenson, 224 Ill. App. 221 (1922).

In all the cases cited by petitioner, wherein a federal court enjoined the prevailing party in the state court from enforcing a judgment secured therein, the judgments were for money only. *Simon vs. Southern Ry. Co.,* 236 U. S. 115, is typical of cases relied upon by petitioner.

In all these cases, the plaintiff in the state court merely changed his claim from an unadjudicated claim to an adjudicated claim; and in order to secure payment the judgment creditor was required either to cause a levy of execution to be made or to commence new proceedings in another court.

As this court said, in the *Simon* case, when the plaintiff in the state court endeavors to use the judgment, which he has obtained, a new state of facts not within the language of the statute may arise which may warrant the federal court in an appropriate case to enjoin the enforcement of the judgment.

In the case of a judgment in *quo warranto*, the situation is materially different. The court orders the defendant to cease usurping the franchise and may enforce its order *sua sponte*. By an action in *quo warranto* the executive branch of the state government transfers to the judicial branch the duty of vindicating the state and protecting its citizens against a usurper. No further action by the officer of the executive branch of the government bringing the suit is required to make the judgment effective. To prevent the enforcement of the order of ouster, the injunction of the federal court must operate upon the state court and its officers. A direct interference with proceedings in the state court is, therefore, involved.

Cf:

Evans vs. Gorman, 115 F. 399;
Harrison et al. vs. Triplex Gold Mines, Ltd., et al., 33 F. (2d) 667, 672;
Russell vs. Detrick, 23 F. (2d) 175;
Western Union Telegraph Co. vs. L. & N. R. Co., 218 F. 628.

The well recognized principle, that a court will enjoin "that which purports to be a judgment but is, in fact, an absolute nullity," is the controlling reason which prevents the inhibition contained in Section 265, Judicial Code, from being universal in its scope.

This court, in *Wells Fargo & Co. vs. Taylor, supra*, declared that the provision of Section 265 of the Judicial Code was "designed to be in accord with, and not antagonistic to, our dual system of courts." The few types of cases, which constitute the exceptions, are classi-

fied in the *Wells Fargo* case as well as in the able and exhaustive opinion in *Russell vs. Detrick, supra.* In the latter case, it appeared that a suit had been instituted in a state court for the cancellation of certain securities of the value of $115,000.00 held by a state insurance commissioner as security for the payment of insurance policies issued to various parties. Detrick, the insurance commissioner, filed his bill in equity in the United States District Court and was granted an injunction by that court restraining the prosecution of the suit in the state court. Adverting to Section 265 of the Judicial Code, Circuit Judge Gilbert, at page 178, used the following language:

> "But the present case does not belong in the class of any of the recognized exceptions. It is an injunction against the plaintiffs in a state court, enjoining them against taking further steps in the prosecution of suits to cancel securities, and it is issued on behalf of plaintiffs in a federal court, not parties to the suits in the state court, to defeat cancellation of the securities and protect their own interest therein. We think the injunction comes clearly within the prohibition of Section 265."

Louisville Trust Co. vs. City of Cincinnati, 76 F. 296, is the only case we have found which discusses the power of a federal court to enjoin the enforcement of a judgment of ouster in *quo warranto* issued by a state court under Judicial Code Section 265.

The *Simon* case and the other money judgment cases relied upon by petitioner are not inconsistent with the statement, in the *Louisville Trust Co.* case, of Mr. Justice Lurton, then a circuit judge, that such an injunc-

tion constitutes a violation of Section 265 of the Judicial Code, and that the court could not enjoin the enforcement of a writ of ouster in *quo warranto* or proceedings to secure enforcement of such writ. We recognize that such an injunction was not involved in that case. In the *Louisville Trust Co.* case, the injunctional order only restrained the defendant "from taking into its own hands the enforcement of the decree of the state court." The court, also, pointed out, in substance, that it would be improper to enjoin the defendant from applying for any writ, which the state court might lawfully issue or to prevent the execution of such writ "although its execution might be destructive of the interests of the complainant."

(c) By Reason of the Nature of an Action in Quo Warranto in Ohio, the City Was Not and Could Not Be a Party to the Proceedings in Quo Warranto.

The respondent city was not a party to the *quo warranto* case. Under the Ohio *quo warranto* statutes, it could not bring a *quo warranto* action, and has no standing to secure the enforcement of the decree of ouster issued by the Court of Appeals of Huron County against Ohio Electric Power Company. It is, therefore, clear that the injunction granted by the District Court in the case at bar can have no effect unless it acts upon the Court of Appeals of Huron County itself and upon other persons not parties to this litigation and not representatives of the respondent city. This action constitutes an attempt to secure by indirection what cannot be secured directly by reason of the prohibition against

suits against the State of Ohio contained in the Eleventh Amendment to the Constitution of the United States and the prohibition against injunction with respect to state court proceedings contained in Section 265 of the Judicial Code. The allegations of the bill of complaint and the proof with respect to alleged direct interference by the city with the property of petitioner are mere subterfuges to cover the real purpose of petitioner, namely: to enjoin enforcement of the ouster decree in the *quo warranto* action. The Circuit Court of Appeals so viewed the situation.

In Ohio, judicial practice respecting the writ of *quo warranto* is controlled by constitutional and legislative provisions:

(1) By Section 2 of Article IV giving to the Supreme Court of Ohio original jurisdiction in *quo warranto*, and by Section 6 of the same article giving, also, to the Court of Appeals original jurisdiction in *quo warranto;* and

(2) By legislation, as shown at pages 31-35 of the (Appendix) brief of counsel for petitioner.

Not only necessarily must an action of this kind be brought in the name of the state, but the question of determining whether it shall be instituted is left either to the attorney general of the state or to the prosecuting officers of the proper county, who exercises his own discretion in the matter and, therefore, the state is the substantial party plaintiff in an action of this character where a corporation is assuming to exercise and enjoy a public franchise, without having such right granted to it by the proper public authorities.

In Ohio, it has become a civil action and, in disposing of an action in *quo warranto*, upon passing judgment, the duty devolves upon the court to exercise its sound discretion, as indicated in *State ex rel. vs. Mutual Benefit Association*, 42 O. S. 579, in which the court, among other things, held:

> "Whether a corporation which is shown, upon a *quo warranto* proceeding, to have misused or abused its franchises, should be ousted of its corporate franchises, is a question not capable of determination by any fixed rule or test, but rests in the sound discretion of the court, in the light of all the circumstances of the case before it."

Whatever rights petitioner may have acquired by virtue of its mortgage in the property of Ohio Electric Power Company were subject, as petitioner must have known when it took the bonds of the Power Company and accepted its mortgage, to a challenge by the State of Ohio to the mortgagor's rights in and to the streets of the City of Norwalk, Ohio.

2. THE PETITIONER'S CLAIM OF PERPETUAL FRANCHISE IS WITHOUT SUBSTANCE

(a) The Franchise Ordinance of October 7, 1890, Limited as It Was to a Twenty-Year Term, Constituted a Binding Agreement Upon Norwalk Incandescent Light Company and Its Successors, Including the Petitioner, Under the Decisions of This Court.

The electrical distribution system of Ohio Electric Power Company in the City of Norwalk was constructed by Norwalk Incandescent Light Company in 1890 under

the franchise ordinances of that year, which were limited in term to twenty years. Such term having expired, petitioner now claims a perpetual franchise by incorporation.

No franchise ordinance was ever granted by the City of Norwalk to any electric light corporation or person, after the one of October 7, 1890.

In *Bankers Trust Co. vs. City of Raton,* 258 U. S. 328, a similar claim was made. This court there ignored the question of the source of the franchise rights of the mortgagor, and held that construction and operation of the water system there involved under the franchise ordinance limited to twenty-five years, estopped the utility and its mortgagee from asserting a perpetual franchise by incorporation. Mr. Justice McKenna speaking for this court, in his opinion, at page 335, said:

> "We are not called upon to review in detail the contentions and consider their various elements. We concur in the view of the city that the Water Works Company is estopped by its contract with the city, evidenced by Ordinance No. 10 (which, we may remark, was ratified by a vote of the citizens of the city), and we construe it as the city construes it. From what act the power to enact it was derived we need not pronounce. We may say, however, that the Supreme Court of the state in *Raton Waterworks Co. vs. Raton,* 22 N. M. 464, 164 Pac. 826, said the franchise of the company was granted by an ordinance of the city, and certainly the bill in this case shows that its term was fixed at twenty-five years from July 25, 1891. The term, therefore, had expired when the amended bill was filed. The term of the rights having expired, necessarily the rights granted expired, and the city cannot be enjoined from requiring the removal of the company's system from the streets of the city."

In *Ohio Public Service Co. vs. State of Ohio ex rel. Fritz*, 274 U. S. 12, and in *Hardin-Wyandot Lighting Co. vs. Upper Sandusky*, 251 U. S. 173, this court held that municipal electric light franchise ordinances adopted between 1887 and 1896 were binding contracts enforcible against the municipalities involved. It follows that such ordinances are, also, binding against the utility, securing such rights, and its successors in title.

These cases and *Northern Ohio Traction Co. vs. State of Ohio*, 245 U. S. 574, in holding that municipal franchise ordinances without limitation in term are perpetual, are not in point here since the municipal ordinance here under discussion was definitely limited to a term of twenty years.

(b) Under the Statutes of Ohio and the Decisions of the Supreme Court of Ohio Construing the Same, Predecessors of Petitioner's Mortgagor Did Not Secure a Perpetual Easement to Use the Streets of Respondent City by Incorporation.

In *State of Ohio ex rel. Martin vs. Ohio Electric Power Co.*, 35 O. App. 481, and *Ohio Electric Power Co. vs. State ex rel. Martin*, 121 O. S. 235, the Court of Appeals of Huron County, Ohio, and the Supreme Court of Ohio held that the predecessors of petitioner's mortgagor did not secure a perpetual easement by incorporation in 1891 and 1895, respectively, but that agreement with the respondent city or an order of the Probate Court was required before any easement other than that conferred by the ordinance of October 7, 1890, limited to twenty years, could be secured. Since none of mort-

gagor's predecessors had entered into any agreement with the city, other than the twenty-year franchise, or had secured an order from the Probate Court, it was held that Ohio Electric Power Company, petitioner's mortgagor, had no continuing right to operate in the streets of respondent city.

Petitioner claims that these decisions constitute a deviation from the law as previously decided by the Ohio Supreme Court in *Zanesville vs. Zanesville Telephone & Telegraph Co.*, 64 O. S. 67; *Farmer vs. Columbiana Telephone Co.*, 72 O. S. 526; *Queen City Telephone Co. vs. Cincinnati*, 73 O. S. 64, and *Hardin-Wyandot Lighting Co. vs. Upper Sandusky*, 93 O. S. 428. A careful reading of these cases discloses that in none of them was the question of the nature of the rights of the utility under the situation presented in the present case involved.

Zanesville vs. Zanesville Telephone & Telegraph Co. holds that a right in the nature of a right of eminent domain was secured by a telephone company by incorporation under the magnetic telegraph statutes (Revised Statutes of Ohio, Sec. 3454 to 3471, inclusive).

The right of eminent domain is subject to termination until exercised.

Sears vs. City of Akron, 246 U. S. 242.

Such right in the case of electric light companies was terminated by the Act of April 21, 1896, set forth at page 37 of petitioner's brief.

Hardin-Wyandot Lighting Co. vs. Upper Sandusky, 251 U. S. 173.

In *Farmer vs. Columbiana Telephone Co.*, both parties to the litigation conceded the validity of the municipal franchise there involved, the only question being the validity of a provision for free service.

Queen City Telephone Co. vs. Cincinnati holds that in order to bring action in Probate Court to secure an easement, incorporation must be proved, such decision being in accord with the decision of *Zanesville vs. Zanesville Telephone & Telegraph Co., supra,* that by incorporation only a right of eminent domain is secured.

In *Hardin-Wyandot Lighting Co. vs. Upper Sandusky, supra,* a municipal franchise ordinance was enforced against the utility. No effect was given to the perpetual right alleged to have been secured by incorporation.

Under the Ohio statutes, prior to 1896, agreement with the city or an order of Probate Court was required before a vested easement could be secured, and after 1896 such vested easement could be secured only by agreement with the city. In the instant case, the only agreement with the city was made by the partnership, which could secure no right under the incorporation statutes. This agreement was limited in term to twenty years. The decision of the Ohio courts in *State ex rel. Martin vs. Ohio Electric Power Co.* giving effect to such twenty-year limitation is in no way inconsistent with the earlier decisions of the Supreme Court of Ohio and is a reasonable and proper interpretation of the Ohio statutes, bearing in mind the well settled rule that

> "one who asserts private rights in public property under grants of the character of those under consideration, must, if he would establish them,

come prepared to show that they have been conferred in plain terms, for nothing passes by grant except it be clearly stated or necessarily implied."

Blair vs. Chicago, 201 U. S. 400, 463.

See also:

Louisville Trust Co. vs. Cincinnati, supra, 308.

Even if we assume that there has been a change in the course of Ohio judicial decisions relative to electric light franchises, it does not follow that the federal courts are bound by the earlier decisions rather than by the latest pronouncement of the Supreme Court of Ohio as to the law of the state on this subject. The doctrine announced in *Gelpcke vs. City of Dubuque*, 1 Wallace 175, 68 U. S. 175, applies to the particular facts involved in that case, and has never been extended further than therein announced.

In *Great Northern Ry. Co. vs. Sunburst Oil & Refining Co.*, 287 U. S. 358, 77 L. Ed. 153, we find the latest expression of this court regarding the law applicable to intermediate transactions where a court has reversed a former holding, wherein this court accepted the construction given to a state statute by the highest court of the state.

The present situation is not analogous to the situation in *Gelpcke vs. Dubuque* where municipal bonds of a particular type had been held valid by the Supreme Court of Iowa prior to their issuance by the defendant and were held invalid after their issuance. In the case at issue the defendant has not attempted to deny the validity of its own contractual obligations. The distinc-

tion is recognized in *Hill vs. Elizabeth City*, 291 Fed. 194, 210. In that case the bondholders of a municipal electric light, power and water system attempted to assert an estoppel against a change of decision by the North Carolina courts upon the question of whether the construction of a municipal plant constituted a necessary expenditure. The federal court refused to apply any such extension of the doctrine of *Gelpcke vs. Dubuque*.

3. ENFORCEMENT OF A VALID STATE COURT JUDGMENT CANNOT BE ENJOINED BY A PERSON NOT A PARTY TO SUCH STATE PROCEEDINGS UPON THE GROUND THAT SUCH PERSON HAS BEEN DEPRIVED OF PROPERTY WITHOUT DUE PROCESS OF LAW.

As the Circuit Court of Appeals, in the instant case, said, the decree of the state court is not an adjudication against the petitioner, which was not a party to the *quo warranto* action. It does not follow, however, from that fact that the petitioner has been deprived of its property without due process so as to give the federal court jurisdiction to restrain enforcement of the state court's judgment upon the ground that the Fourteenth Amendment to the Federal Constitution has been violated.

In *Bristow Battery Co. vs. Board of Commissioners*, 37 F. (2d) 504, *certiorari* denied 282 U. S. 843, as the reviewing court pointed out, the bill of complaint in substance asked a federal court to review the rulings of the State Supreme Court in a case to which the complainant was not a party and to hold that the State Supreme

Court was in error. Such a contention, the court held, does not present a federal question, since even an erroneous decision does not deprive the unsuccessful party, or others not parties to the litigation but affected thereby, of property without due process of law within the Fourteenth Amendment to the Constitution of the United States.

In *Association vs. Hurst, supra,* Mr. Chief Justice Taft, then circuit judge, in announcing the judgment of the Circuit Court of Appeals, Sixth Circuit, that the sale of land by a sheriff under an execution issued by a state court can not be enjoined, "even though the land levied upon belongs to a stranger to the proceedings," used the following language relative to the construction of Section 720, Revised Statutes, now Section 265, Judicial Code:

> "That section was passed, not to preserve comity and harmonious action between courts of the same sovereign exercising concurrent jurisdiction, but to attain such an end, and prevent unseemly conflict between courts of different sovereigns exercising concurrent jurisdiction over the same territory. The purpose of the statute is so important that a liberal construction should be given to accomplish it."

As was pointed out in the *Bristow Battery Company* case, *supra,* and the authorities there cited, the decision of a state court upon a question of law, however wrong and however contrary to previous decisions, is not an infraction of the Fourteenth Amendment to the Federal Constitution merely because it is wrong or because earlier decisions are reversed.

It is the contention of respondent that the judgment and decree of the District Court run counter to the letter and spirit of said Section 265 of the Judicial Code, and that the order of the Circuit Court to dissolve the injunction and dismiss the bill is in conformity with the inhibition of that section and the decisions of this court.

The order of ouster granted by the State Court of Appeals is not void or voidable. Neither was it issued under any mistake of fact. There is no claim that it was in any wise tainted by fraud. It did not in any manner affect or interfere with the jurisdiction of the federal courts. That there is a possibility that the enforcement of such order may affect or interfere with the rights of third persons not parties to the *quo warranto* proceeding does not afford any basis for interference with the proceedings of the state court by the injunctive process of a federal court. The *quo warranto* proceeding was instituted by the State of Ohio. The matter of instituting such proceeding was entirely lodged in the sound discretion of the prosecuting attorney. The state courts found for the State of Ohio.

CONCLUSION

Petitioner is merely attempting to obtain a readjudication of the law and facts adjudicated by the state courts of competent jurisdiction in the *quo warranto* proceeding, to which its mortgagor was a party. Inasmuch as the decision of the Circuit Court of Appeals of the Sixth Circuit rendered in the present case does not conflict with prior decisions of this court, or any other federal court, and none of the conditions essential for

the exercise by a federal court of its power to enjoin the enforcement of a judgment of a state court is present, the writ prayed for herein should be denied.

Respectfully submitted,

REX F. BRACY,
E. G. MARTIN,
WILLIAMS, EVERSMAN & MORGAN,
Solicitors for Respondent.

G. RAY CRAIG,
WALTER A. EVERSMAN,
HUGH C. LAUGHLIN,
Of Counsel for Respondent.

APPENDIX "A"

The State, ex rel. Martin, Pros. Atty.,

Plaintiff,

vs.

The Ohio Electric Power Co.,

Defendant.

In the Court of Appeals, Huron County, Ohio

OPINION

Municipal corporations—Written acceptance of ordinance granting partnership use of streets, unnecessary—Incorporation of public service company sufficient acceptance, when—Statutes granting electric companies street privileges contemplate incorporated companies only—Sections 9170, 9178, 9179, 9191, 9192, 9193, and 9194, General Code—Rights greater than given by ordinance cannot be claimed by assignee, when—Estoppel not created by use after franchise ordinance expired.

1. Where ordinance of municipality granting partnership a franchise to furnish electricity was silent as to manner of acceptance thereof, but partnership thereafter installed the necessary equipment and furnished and distributed electricity in municipality until incorporation of company by members of partnership to take over and conduct its business, to which all of the partnership property was transferred, the corporation thereafter continuing to furnish and distribute electricity as had the partnership theretofore, formal acceptance of the ordinance was not necessary.

2. Statutes granting privileges in streets to electric companies did not contemplate partnerships or individuals, but only incorporated companies.

3. Electric company, as assignee of partnership, having relied solely on ordinance granting to partnership, its successors and assigns, use of streets for a definite period, could not after expiration thereof, claim to possess any greater rights than the ordinance gave.

4. The continued use by the defendant of the streets and the furnishing and distribution of electricity within the municipality, after the expiration of the franchise granted by the ordinance, without further acquiring the right to do so in the manner provided by law, did not create an estoppel against the municipality in favor of the defendant.

(Decided May 21, 1928)

IN QUO WARRANTO

Mr. Edgar G. Martin, prosecuting attorney, Mr. G. Ray Craig and Mr. Charles Suhr, for plaintiff.

Messrs. Fauver & Fauver and Mr. W. R. Pruner, for defendant.

Lloyd, J. This is an action in quo warranto, whereby the plaintiff, the State of Ohio, on relation of Edgar G. Martin, prosecuting attorney of Huron County, seeks to oust the defendant, The Ohio Electric Power Company, from using the public streets, lanes, alleys, avenues, and other public places of the City of Norwalk for the erection and maintenance of poles, wires, guy wires, and electrical equipment for the distribution of electricity for heat, light, and power purposes in said municipality.

The defendant is a corporation, incorporated in August, 1924, under the laws of Ohio, for the purpose, among others, of engaging in the business of operating power plants with the necessary appliances, equipment, etc., for furnishing and distributing electricity for private and public consumption, and since 1922 has been furnishing electricity to such of the people of Norwalk as choose to become its customers.

In 1890 six men, of whom there is now but one resident survivor, formed a partnership under the name of the Norwalk Incandescent Light Company to furnish electricity in the City of Norwalk for commercial purposes. Thereafter, upon application of the partnership therefor, the City of Norwalk, by ordinance passed October 7, 1890, granted to it, its successors and assigns for the term of twenty years, "a right of way through, in and upon the streets, sidewalks and alleys and grounds of said city for the use and purpose of therein and thereon erecting and maintaining and using all necessary poles or posts of wood, iron or other suitable material, and the necessary wires to successfully operate and use a system of incandescent lighting in said city."

That ordinance contains certain restrictive conditions as to the height and location of the poles, and provides that "this grant of way is not exclusive." It contained no provision or condition as to how or in what manner the grantee should indicate its acceptance thereof, but the necessary equipment was installed by the partnership, and it thereafter conducted its business of furnishing and distributing electricity in Norwalk until the incorporation in March, 1891, of The Incandescent Light & Power Company of Norwalk, Ohio, for the pur-

pose of "furnishing to the citizens of Norwalk and vicinity electric lighting of both arc and incandescent, * * * electric * * * power and * * * electricity for heating, for profit." In our judgment this was in law an acceptance thereof, and a formal written acceptance under these circumstances was unnecessary.

The Incandescent Light & Power Company of Norwalk, Ohio, was incorporated by the members of the partnership and one or two others, and upon its incorporation the partnership transferred to it all of the partnership property, and it proceeded to use the plant and equipment of the partnership to furnish electricity for lighting and commercial purposes in Norwalk. It continued so to do until February, 1893, when it filed in the Probate Court of Huron County a general deed of assignment for the benefit of creditors. By this deed it conveyed and assigned to the assignees named therein "all of its property of every nature and kind whatsoever." By a deed of the assignees, pursuant to an order of sale issued by the Court of Common Pleas, to which an appeal had been taken from the Probate Court, all of the property, including "all franchises, patronage and good will and rights of said business" of The Incandescent Light & Power Company, was conveyed and transferred on March 7, 1895, to George F. Jones and Mayme C. Foster, their heirs and assigns, who by deed dated May 20, 1895, by similar description, conveyed the property so acquired by them to The Northern Electric Company, "its successors, heirs and assigns." Thereafter, on May 8, 1900, the grantee corporation conveyed this property by like description to The Norwalk Gas & Electric Company, its successors and assigns. On July

16, 1895, the City of Norwalk entered into a contract with The Northern Electric Company for lighting the streets, alleys, etc., of the city for a period of ten years from September 1, 1895, which contract, by consent of the city, was assigned to The Northern Gas & Electric Company, and by the latter company, with consent of the city, assigned to The Cleveland Southwestern Traction Company; and on April 13, 1905, a second contract for street lighting for a period of ten years from September 1, 1905, was entered into by the city with The Cleveland Southwestern Traction Company.

The Norwalk Gas & Electric Company owned and operated the property and business until February 14, 1903, when it conveyed and transferred all of its property, franchise rights, and privileges to The Cleveland Southwestern Traction Company, its successors and assigns, by which company the property so described was conveyed and transferred to The Cleveland, Southwestern & Columbus Railway Company, which in turn, on March 1, 1924, conveyed and transferred it to The Cleveland Southwestern Railway & Light Company. On December 31, 1924, the last above named company, with the consent of the Public Utilities Commission of Ohio, transferred by bill of sale to one Victor Emanuel, by specific description, certain tangible personal property in Norwalk and "all distributing power and light systems, transformers, meters, services and the equipment and appurtenances thereto or in connection therewith of the grantor within the corporate limits of the City of Norwalk, Ohio, including approximately 8.3 miles of lines and poles of the grantor, approximately 5.2 miles of lines on poles of others than the grantor, and approxi-

mately 4.3 miles of lines on poles owned jointly by the grantor and others, together with all right, title and interest of the grantor in and to the poles so occupied jointly."

On May 22, 1925, Victor Emanuel executed to the defendant, The Ohio Electric Power Company, a bill of sale for the above property in the identical language and form of the conveyance to him from The Cleveland Southwestern Railway & Light Company. Also on December 31, 1924, The Cleveland Southwestern Railway & Light Company conveyed to said Emanuel "all such right and title as it has or ought to have in the following described premises,—describing certain rights of way and other personal property—and "all right, title and interest of the grantor in and to any rights of way for a pole line, pole line rights, pole lines, poles and any licenses, franchises, easements or grants for said purposes possessed or enjoyed by the grantor in the City of Norwalk, Ohio, and/or used in connection with the distribution of power, light and heat by the grantor in said city."

On May 22, 1925, Victor Emanuel, in consideration of $10 and other good and valuable considerations, sold, assigned, and quit-claimed to The Ohio Electric Power Company, its successors and assigns, certain specifically described property, and all contracts, franchises, grants, rights and privileges in the City of Norwalk acquired from The Cleveland Southwestern Railway & Light Company.

The relator contends that the defendant has no right to occupy the streets, alleys, and public places in the City of Norwalk with its poles, wires, etc., for the

distribution of electricity therein, for the reason that the franchise granted by the municipality to the partnership, the Norwalk Incandescent Light Company, expired by limitation on October 7, 1910, and, the city not having thereafter consented to such use and occupation of its streets and other public places, the rights and privileges so granted, thereupon ceased. The defendant claims, first, that by legislative enactment passed January 26, 1887, and operative until April 21, 1896, when it was materially changed by amendment, its predecessors in the right to occupy the streets and public ways and places of Norwalk obtained such privilege and authority directly from the state, and that, as the successor to them, by conveyance and assignment, it now possesses the rights and privileges so acquired; and, second, that the City of Norwalk, having permitted defendant and its predecessors in title to continue to so occupy its streets and public places and furnish commercial and private lighting in the municipality, is now estopped to deny the right of respondent to so conduct its business in Norwalk and to occupy the streets and public places thereof for such purposes.

Chapter 2, Subdivision 2, Division 2, Title IX of Part II of the General Code, relates to telegraph and telephone companies, and Section 9170 thereof, formerly Section 3454, Revised Statutes, provides that "A magnetic telegraph company may construct telegraph lines, from point to point, along and upon any public road by the erection of the necessary fixtures, including posts, piers and abutments necessary for the wires; but shall not incommode the public in the use thereof."

Section 3471, Revised Statutes, now Section 9191, General Code, made the provisions of this chapter applicable also to telephone companies.

Section 3471a, Revised Statutes, now Sections 9192, 9193 and 9194, General Code, as originally enacted January 26, 1887, 84 Ohio Laws, 7, provided: "The provisions of this chapter, so far as the same may be applicable, shall apply also to any company organized for the purpose of supplying the public and private buildings, manufacturing establishments, streets, alleys, lanes, lands, squares, and public places with electric light and power, and every such company shall have the same powers and be subject to the same restrictions as are herein prescribed for magnetic telegraph companies."

This statute continued in force until April 21, 1896, when it was amended, 92 Ohio Laws, 204, and as amended provided that "every such company shall have the same powers, except those given by said section three thousand four hundred and sixty-one, and be subject to the same restrictions, as are herein prescribed for magnetic telegraph companies," and that, "in order to subject the same to municipal control alone, no person or company shall place, string, construct or maintain any line, wire fixture or appliance of any kind for conducting electricity for lighting, heating of power purposes through any street, alley, lane, square, place or land of any city, village or town, without the consent of such municipality."

Section 3461, Revised Statutes, now Sections 9178 and 9179, General Code, relates to appropriation proceedings by telegraph companies, and by enactment of Section 3471a, Revised Statutes (Section 9192, General

Code), became applicable to electric light and power companies. This section (Section 3461, Revised Statutes) provides in substance that the "mode of use" by any such company of the streets, alleys, etc., of any city or village, shall be such as shall be agreed upon by the municipal authorities thereof and the company, and, if they are unable to agree, the Probate Court in proceedings brought therein shall direct in what mode such line shall be constructed along such streets, alleys, etc. It is apparent, therefore, that on October 7, 1890, when the ordinance was passed by the City of Norwalk granting to the partnership, the Norwalk Incandescent Light Company, its successors and assigns, the right to occupy the streets and public places of the city for the purposes therein stated, and thereafter, until April 21, 1896, when Section 3471a was amended (92 Ohio Laws, 204), neither a partnership nor any other person or company engaged in a like business was privileged to occupy the streets, alleys, etc., of any municipality in Ohio without either an agreement with the municipality or an order of the Probate Court directing the mode of such occupancy. It seems to us that neither a partnership nor an individual was contemplated by or designated in these statutory provisions. Their context seems clearly to indicate that the privileges thereby granted by the state applied only to incorporated companies. If this conclusion is correct, then not only the right to use, but the mode of use, could have been acquired by the partnership not otherwise than with the consent of the municipality expressed in an ordinance conferring those privileges. This the City of Norwalk did by the ordinance of October 7, 1890, limiting therein the right to use and the

mode of use to twenty years from that date. The partnership, therefore, and its successive assignees, acquired the right to occupy the streets, alleys, etc., of Norwalk from the city and not from the state. Surely an electric light and power company upon which the state has conferred certain rights, conditional upon complance with the legislative enactments creating them, may not as an assignee of a partnership or an individual acquire the rights so granted in derogation of the authority conferring them.

Any of the corporate assignees of the partnership could at any time have sought to agree with the municipal authorities as to the mode of use of the streets, alleys, etc., of the city in the exercise of their corporate functions and authority; and, if agreement between them was not possible, might have instituted proceedings in the Probate Court of Huron County to effect this purpose. The Northern Electric Company which last occupied the streets, etc., of Norwalk, prior to April 21, 1896, when Section 3471a, Revised Statutes, was amended, might have so proceeded at the expiration of the time fixed in the ordinance. Not having done so, and having relied solely upon the ordinance, with its restrictive terms and conditions, until the time within which the proceedings authorized by Section 3461, Revised Statutes, might have been invoked had elapsed, we are of the opinion that the respondent cannot now claim to be possessed of any greater rights than the ordinance gave. If the partnership were held to be such a company as was included within the purview of Sections 3454 and 3471a, Revised Statutes, then its right to occupy the streets of Norwalk was conditioned upon its

agreeing with the municipal authorities as to the mode of use; or, failing so to agree, upon the direction of the Probate Court of the county as to the mode of use, in a proceeding instituted for that purpose; and such agreement or direction is inseparable from such right, and such right terminates with such agreement or direction. (State, ex rel., vs. Central Union Telephone Co., 11 C. C. 55, 5 C. D. 311.)

The views we have here expressed and the conclusion at which we have arrived are not in conflict with the decision of the United States Supreme Court in Ohio Public Service Co. vs. Ohio, ex rel. Fritz, 274 U. S. 12, 47 S. Ct. 480, 71 L. Ed. 898, for the reason that the franchise there involved was for an unlimited time. Being of the opinion also that the doctrine of estoppel has no application to the facts here presented, we conclude that the prayer of the relator should be granted.

Judgment accordingly.

Richards and Williams, JJ., concur.

(Vol. 35, Ohio App. Rep. 481.)

APPENDIX "B"

IN THE SUPREME COURT OF OHIO

No.....

Ohio Electric Power Co.,
Plaintiff in Error,

vs.

The State, ex rel. Martin, Pros. Atty.,
Defendant in Error.

Error to the Court of Appeals of Huron County

Per Curiam
OPINION

Municipal corporations — Twenty-year electric light franchise granted in 1890 (84 O. L., 7)—Perpetual right to occupy streets not acquired from state, when—Nor by acquiescence or non-action of public officials or through estoppel.

(No. 21302—Decided June 12, 1929.)

Messrs. Fauver & Fauver, and Mr. W. R. Pruner, for plaintiff in error.

Mr. Edgar G. Martin, Mr. G. Ray Craig, and Mr. Charles Suhr, city solicitor, for defendant in error.

By the Court: This is an action in quo warranto, originating in the Court of Appeals of Huron County, wherein is challenged the right of the defendant, the Ohio Electric Power Company, to maintain its poles, wires, and electrical equipment in the streets, alleys, and

public places in the City of Norwalk for the purpose of distributing and supplying electric current for commercial and private lighting, and plaintiff prays an order ousting the defendant therefrom. The Court of Appeals on hearing found for the plaintiff and ordered a decree of ouster as prayed for in the petition. Thereupon a petition in error was filed in this court.

The rights of the respective parties may readily be ascertained from a consideration of the facts disclosed by the record. The defendant, the Ohio Electric Power Company, became the owner of the property concerned, and of certain rights, privileges, and franchises, by successive grants from the Northern Electric Company, a corporation formed April 30, 1895. Shortly after its incorporation, to-wit, May 20, 1895, the Northern Electric Company procured a transfer to itself of the property, including all rights and franchises, theretofore belonging to the Incandescent Light & Power Company, a corporation organized March 7, 1891, and had acquired a 20-year franchise, which in 1890 had been granted to the Norwalk Incandescent Light Company, a partnership. The grant by the municipality to the partnership, which thereafter incorporated and became the Incandescent Light & Power Company, was for a stipulated and expressly limited term of 20 years, and granted a right of way upon the streets, alleys, and public grounds of said city for the purpose of therein erecting and maintaining necessary poles and wires to provide and successfully operate a system of incandescent lighting. No written acceptance was provided for, nor shown in the record, but it does appear that the ordinance was enacted upon the application of the partnership, members of which

attended the meeting of council and personally accepted the grant, and thereupon the grantees entered upon, and thereafter the company which took over the property of the partnership continued to operate, the plant and lines constituting the only lighting system then existing in the City of Norwalk. Said company was incorporated in March, 1891, its purpose being the furnishing to the citizens of Norwalk and vicinity electric current for lighting, power, and heating. Later, through an assignee for creditors, and by order of court, all the property of said company, including "all franchises, patronage, good will and rights of said business," were sold and transferred to certain individuals named, who, in May, 1895, by conveyance of similar purport and description, transferred the same to the Northern Electric Company. By like description the same property was on May 8, 1900, conveyed to the Norwalk Gas & Electric Company, which had been organized and incorporated under the laws of Ohio April 17, 1900.

Thereupon the council of the City of Norwalk consented to an assignment of a 10-year contract for street lighting to the last named company, which contract had been entered into by the city and the Northern Electric Company in July, 1895. By a similar description said property was transferred to the Cleveland & Southern Traction Company in February, 1903. In April, 1905, the latter company entered into a contract with the City of Norwalk for street lighting in anticipation of the expiration of the former contract, no reference being made therein to commercial lighting; but the contract did provide for the erection and maintenance of poles, etc., under the "restrictions and limitations imposed by said

city," and contained the express provision that "nothing herein contained shall permit said use or occupation of said streets, alleys, and other public places after the expiration of this contract, to-wit, August 31, 1915." That contract further provided as follows: "The said contractor, at the expiration of this contract, shall upon request of the said city remove all poles, posts, lamps, wires and other apparatus or material of every kind and description from the streets, alleys and other public places in said city, and restore said streets, alleys, and other public places to as good a condition as the same may be at the time of such removal, and in default thereof after 30 days' notice from said city the same may be done by said city or its agents, and said contractor shall pay to said city all costs and expenses thereby incurred."

It is to be observed that no franchise was given for electric light or power purposes, or grant of any character made by the council of the City of Norwalk, subsequent to the 20-year franchise, and that franchise by its express terms expired in 1910, and no contract of any kind or character relative to the furnishing and distribution of electric current, except street lighting contracts above referred to, was entered into by and between the city and either of said companies. The defendant in this action acquired whatever property and rights it has, which are involved herein, by successive grants from the Cleveland & Southern Traction Company.

This record discloses that the City of Norwalk erected a municipal plant in 1915, and constructed, and has since maintained and operated, a complete system, whereby it supplies current for all its street lighting and

also meets the demand for most of the current consumed for private and commercial use in the city.

Under the facts presented by the record the claim of the defendant that by reason of the occupancy of the streets of the City of Norwalk its predecessor obtained a perpetual right to occupy said streets, to which right this defendant has succeeded, cannot be sustained. Under the law as it stood in 1890, when such 20-year franchise was granted, the partnership could not have acquired such right otherwise than through the municipality itself. Authority was conferred only upon incorporated companies designated by statute to so occupy the streets of a municipality, and then only by conforming to the method of procedure prescribed by statute. Concededly no franchise was ever granted, and no agreement with reference to the use and occupancy of the streets ever entered into, except as hereinbefore stated, and no application was made to or action taken by the Probate Court under the statute.

The cases dealing with unlimited franchise grants have no application here. The companies which successively acquired the property and rights of the grantee of the 20-year franchise necessarily accepted the burdens as well as the benefits of that franchise. They could not take the grant free from the limitations expressly imposed. That franchise by its own terms expired in 1910, and every right of the predecessor of the defendant to occupy said streets, or any part thereof, ceased on August 31, 1915, under the clear and express terms of its contract above recited, and it could not thereafter convey something which it no longer possessed.

Mere acquiescence in the continued unauthorized occupancy of the streets, or non-action on the part of public officials to prevent obstruction, or delay in bringing action to procure an order of ouster, could not serve to confer any right upon the defendant company or estop the city from maintaining this proceeding.

Judgment affirmed.

Marshall, C.J., Robinson, Jones, Matthias, Day and Allen, JJ., concur; Kinkade, J., not participating.

(121 Ohio State, p. 235.)